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No. 06-233

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

REPLY TO BRIEF IN OPPOSITION

Vernon K. Smith
1900 W. Main Street
Boise, Idaho 83702
(208) 345-1125

Attorney for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES.....	ii
TABLE OF APPENDICES (SUPPLEMENTAL).....	v
REPLY TO BRIEF IN OPPOSITION.....	1
SUMMARY AND CONCLUSION.....	10

TABLE OF CITED AUTHORITIES

Page

Cases

Bayer v. Town of Peshtigo,
Case No. 05-C-661, United States District Court,
E.D. Wisconsin, September 11, 2006..... 3, 5

Belas v. Juniata County School Dist.,
Civil Action No. 1:CV-04-505, United States District
Court, M.D. Pennsylvania, August 26, 2005..... 3, 4

Carey v. Piphus,
435 U.S. 247, 259 (1978)..... 2

Cleveland Board of Education v. Loudermill,
470 U.S. 532, 105 S.Ct. 1487 (1985)..... 1, 4, 5

Day v. Borough of Carlisle,
Civil Action No. 1:CV-04-1040, United States
District Court, M.D. Pennsylvania, July 10, 2006..... 3, 6

Gibson v. Ada County Sheriff's Department,
139 Idaho 5, P.3d 845 (2003)..... 8

Gibson v. Ada County, et al.,
142 Idaho 746, 133 P.3d 1211 (2006)..... 7, 8

Gibson v. Ada County, et al.,
CV05-263-S-EJL, United States District Court, Idaho... 9

Gibson v. Ada County, et al.,
06-35600, 9th Circuit Court of Appeals..... 10

Gilbert v. Homar,
520 U.S. 924 (1997)..... 1, 4

Homar v. Gilbert,
89 F.3d 1009 (3rd Cir. 1996)..... 1, 4

Table Of Cited Authorities

	Page
Horton v. Bd., Cnty. Com'rs, Flagler Cnty., 202 F.3d 1297 (11th Cir. 2000).....	3, 9
Kildare v. Saenz, 325 F.3d 1078 1085-1086 ((9th Cir. 2003).....	3
Koltonuk v. Borough of Laureldale, Civil Action No. 05-0106, United States District Court, E.D. Pennsylvania, July 18, 2006.....	3, 5
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....	6
McNulty v. Sandoval County, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005.....	10
Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990.....	8
Nelson v. Whitesides, 103 Idaho 374, 647 P.2d 1246 (1982).....	8
Parratt v.Taylor, 451 U.S. 527 (1981).....	2, 8
Price v. City of Ormond Beach, Case No. 6:05-cv-1064-Orl-31KRS, United States District Court, M.D. Florida, Orlando Division, May 19, 2006.....	3, 6
Sanchez v. State of Idaho, Department of Corrections, ___ Idaho ___, Docket No. 32266, August 8, 2006.....	9
Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, at 956 (9th Cir. 1991).....	3

Table Of Cited Authorities

	Page
Terlecky v. Downs, No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, January 24, 2006 and March 27, 2006	10
Zinermon v. Burch, 494 U.S. 113 (1990)	2, 5
Constitutions	
U.S. Constitution	5, 9
U.S. Constitution, 14th Amendment	9, 10
Idaho Constitution, Article V, § 9	8
Idaho Constitution, Article 18, § 6	6
Statutes	
29 U.S.C. § 201 *et seq.* (FLSA)	1, 2, 5
42 U.S.C. § 1983	2, 5, 6, 10
Idaho Code, § 10-1201	8
Idaho Code, § 10-1202	8
Idaho Code, § 67-5272(1)	7, 8
Idaho Administrative Procedures Act	7
Ada County Code, § 1-7G-3(O)	8

TABLE OF APPENDICES – SUPPLEMENTAL

Page

APPENDIX 80 – Verified Complaint In The Matter Of *Stacy A. Gibson v. Ada County, et al.*, CV OC 0205601D, Filed July 19, 2002..... 552a

APPENDIX 81 – Memorandum Decision And Order Entered By The U.S. District Court, March 1, 2006..... 589a

APPENDIX 82 – Judgment Entered By The U.S. District Court, March 1, 2006..... 605a

APPENDIX 83 – Letter From Gibson's Counsel To The Sheriff, Prosecuting Attorney, And Human Resource Director, Dated August 6, 1999, Denying All Accusations, Entitlement To Leave, With Pay, Announcing Gibson's Medical Condition, And Demanding Pre-Termination Hearing..... 606a

REPLY TO BRIEF IN OPPOSITION

Introduction

Petitioner and counsel are disappointed as to the manner Respondents continue to inaccurately represent relevant facts. The behavior is consistent with the adage if a deceitful story is told big enough and long enough, people will start to believe it.

Petitioner has continuously pursued relief from Ada County, the Idaho Courts, and the Idaho Supreme Court, seeking an **adequate procedure** to remedy the deprivation of her property right in tenured employment. She found no success in her effort to secure due process, to include the following:

(1) No adequate due process hearing prior to being placed on administrative leave, without pay, and no notice or opportunity to be heard. *See Gilbert v. Homar*, 520 U.S. 924, at 930 (1997); *Homar v. Gilbert*, 89 F.3d 1009, 1015 (3rd Cir. 1996);

(2) No adequate due process opportunity to participate in a pre-termination hearing, a prerequisite. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985);

(3) No adequate due process opportunity to engage in an unbiased post-termination hearing before an unbiased tribunal;

(4) No adequate due process agency review hearing to challenge the basis claimed to terminate Petitioner's employment;

(5) No adequate due process procedure to judicially review the claimed basis to terminate Petitioner's employment, either by a Petition For Judicial Review to a lower court, review by the Idaho Supreme Court, Petition For Declaratory Judgment to the Idaho Supreme Court, Petition For Writ Of Mandamus to the Idaho Supreme Court, or Petition For Writ Of Certiorari to the Idaho Supreme Court;

(6) No adequate judicial review under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 201 *et seq.*, to enforce

the "right of action" for overtime and regular wages due Petitioner; to seek redress for the retaliatory conduct of depriving Petitioner her statutory "right of action" under FLSA; and,

(7) No adequate judicial review under the *Civil Rights Act*, 42 U.S.C. § 1983, causing Petitioner need to seek federal court assistance over procedural due process.

ADEQUATE PROCEDURES ARE REQUIRED TO SATISFY PROCEDURAL DUE PROCESS

A significant procedural due process case was decided by this Court in *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The Due Process Clause encompasses a guarantee of **fair procedure**, and when state action deprives an individual of a constitutionally protected interest in "life, liberty, or **property**", that state deprivation is unconstitutional. *See also Parratt v. Taylor*, 451 U.S. 527, 537 (1981). "Procedural due process rules are meant to protect persons... from the mistaken or **unjustified** deprivation of life, liberty, or property". *See Carey v. Piphus*, 435 U.S. 247, 259 (1978).

A constitutional violation actionable under 42 U.S.C. § 1983 is not complete (actionable) **unless** and **until** the **state fails to provide due process**. *Zinermon*, 494 U.S., at 125-126, stated:

> "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask **what process the State provided, and whether it was constitutionally adequate**. This inquiry would examine the procedural safeguards built into the **statutory** or **administrative procedure** of **effecting** the **deprivation**, and any remedies for erroneous deprivations provided by statute or tort law." (Emphasis added).

Federal courts rely upon *Zinermon*, 494 U.S., to determine **when** a procedural due process violation occurs and **when** the

accrual of the action begins. In these **cases**, the federal courts **confirm** a procedural **due process violation becomes actionable and accrues** when the **State fails to provide due process**. *See Bayer v. Town of Peshtigo*, Case No. 05-C-661, at 7, United States District Court, E.D. Wisconsin, September 11, 2006; *Koltonuk v. Borough of Laureldale*, Civil Action No. 05-0106, at 14-15, United States District Court, E.D. Pennsylvania, July 18, 2006; *Day v. Borough of Carlisle*, Civil Action No. 1:CV-04-1040, at fn7, United States District Court, M.D. Pennsylvania, July 10, 2006; *Price v. City of Ormond Beach*, Case No. 6:05-cv-1064-Orl-31KRS, at 8-10, United States District Court, M.D. Florida, Orlando Division, May 19, 2006; *Belas v. Juniata County School Dist.*, Civil Action No. 1:CV-04-505, at 14, United States District Court, M.D. Pennsylvania, August 26, 2005; *Kildare v. Saenz*, 325 F.3d 1078, at 1085-1086 ((9th Cir. 2003); *Horton v. Bd., Cnty. Com'rs, Flagler Cnty.*, 202 F.3d 1297, at 1300 (11th Cir. 2000); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, at 956 (9th Cir. 1991).

Petitioner Was Denied Adequate Due Process When No Pre-Termination Or Administrative Leave Procedures Were Satisfied

On July 20, 1999, Petitioner was interrogated 2 ½ hours by County agents concerning payroll overpayment by erroneous County deposit to the joint account under the Direct Deposit Program. Petitioner was placed on administrative leave, **with pay**, told of the intent to immediately terminate her and then placed on administrative leave, **without pay**, and later officially terminated, all done without procedural hearings.

By July 28th, the Sheriff's Legal Advisor told Ms. Gibson's counsel if she did not resign, she would be prosecuted for felony grand theft, and terminated anyway. Petitioner rejected the threat. Consequently, on August 2, 1999, the Sheriff served his intent to terminate employment. Ms. Gibson had counsel send a letter (*Appendix 83*, p. 606a), denying all accusations, sought pay if on leave status, and

demanded pre-termination due process hearing required under *Loudermill* and the Merit System. The Sheriff fully understood Dr. Spencer could not allow his patient participate in a confrontational hearing until further notice. *Appendix 52*, p. 261a.

Without providing opportunity to respond to the leave status (*Appendix 48*, p. 254a-255a), the Sheriff's Advisor unilaterally took that action (in contradiction of federal law and Merit System) to declare leave status, without pay, and by federal law is considered *de facto* termination. *See Belas v. Juniata County School Dist.*, at 10-11; *Gilbert v. Homar*, 520 U.S., at 930; *Homar v. Gilbert*,89 F.3d, at 1015.

Even though aware of her continuing health condition (*Appendix 47, 50 & 54*), on December 27, 1999, the Sheriff terminated her employment effective immediately, without allowing procedural *Loudermill* hearing. Petitioner sought review, and demanded a "post-termination hearing" (even though not impartial) allowed in the County ordinance that purportedly authorized judicial review, but later declared by the Idaho Supreme Court a "constitutionally infirm" ordinance. *Appendix 38*, p. 225a, 227a.

Petitioner Was Denied An Adequate Post-Termination Procedure To Satisfy Procedural Due Process

The "post-termination" hearing was held January 25th and 26th, 2000, controlled by the Ada County Personnel Hearing Officer, who restricted discovery efforts to secure wage information and records which caused the mistaken deposits. The Hearing Officer maintained the termination by his ruling on February 15, 2000, and without providing any notice or opportunity to be heard, declared another violation never addressed in the firing or post-termination hearing. Not only has Petitioner not received **adequate** procedural due process in a pre- or post-deprivation process, the Hearing Officer, being a compensated agent and employee of Ada County, rendered a biased decision with inclusion of claims against Ms. Gibson not raised and had no review procedure.

When the Idaho Supreme Court got the appeal, it held (*Appendix 38*, p. 227a) Ada County "incorrectly instructed" Ms. Gibson to appeal the decision to the district court (utilizing a constitutionally "infirm" provision of the County Code), and "prevented this Court from addressing the merits of this matter". *Appendix 38*, p. 227a. Following that announcement, Ms. Gibson sought administrative agency review of the discipline and termination before Ada County Board of Commissioners. *See Appendix* 37, p. 216a.

Ms. Gibson also sought other process to including:

State District Court – Civil Rights Action

Ms. Gibson filed complaint in the State District Court (Case No. CVOC 0205691D) (*Appendix 80*), seeking redress for attempting to thwart procedural due process by threatening prosecution for grand theft to get her resignation (*Appendix 80*, p. 577a-578a), retaliation because she was involved in an FLSA proceeding (*Appendix 80*, p. 568a), orchestration of criminal charges (*Appendix 80*, p. 574a-577a), administrative leave, without pay (*Appendix 80*, p. 570a-571a; 578a-579a), denying a *Loudermill* hearing (*Appendix 80*, p. 568a), and depriving rights guaranteed by the U.S. Constitution Due Process Clause (*Appendix* 80, p. 584a).

The district court (*Appendix 35*, p. 212a-213a) granted Ada County's motion to dismiss and summary judgment, and stated, "a two-year statute of limitations applies to all Title 42 U.S.C. civil rights claims, and that the statute of limitations **on this action** expired on February 15, 2002, therefore the claims are time-barred". As announced in *Zinermon v. Burch*, 494 U.S., at 125, a constitutional violation actionable under § 1983 is not complete when the deprivation occurs, and does not accrue unless and until the State fails to provide due process. *See also Bayer v. Town of Peshtigo*, supra, at 7; *Koltonuk v. Borough of Laureldale*, supra, at 14-15.The **cause of action** for **due process violation** of Ms. Gibson's rights **did not accrue** on February 15, 2000 as stated by the Idaho Court (*Appendix 35*, p. 212a-213a) or as stated by the Idaho

Supreme Court (Appendix 1, p.16a); rather it accrued after Ms. Gibson was denied any adequate procedure (by Ada County, the Idaho Courts, and the Idaho Supreme Court), and did not accrue until May 9, 2006, when the Idaho Supreme Court denied Petition For Rehearing (*Appendix 2*, p. 32a-33a), and only then, did the cause of action accrue for a due process violation. *See Day v. Borough of Carlisle*, supra, at fn 7); *Price v. City of Ormond Beach*, supra, at 9-10; *McDaniels v. Flick*, 59 F.3d, at 461 (3rd Cir. 1995).

Constitutional violations actionable under § 1983 during the discipline and termination period were not complete until the Idaho Supreme Court failed to provide due process; it did not accrue when placed on administrative leave nor at termination on December 27, 1999, nor the decision of the Hearing Officer (February 15, 2000), but rather accrued when the Idaho Supreme Court denied any procedure to grieve those deprivations impacting her classified employment status, on May 9, 2006.

Agency Review – Ada County Commissioners

On July 2, 2003, County Commissioners rejected the request for an agency review hearing, stating they were without legal authority to review the decision over termination (*Appendix 37*, p. 216a-217a.). Respondents vehemently argued Article 18, § 6, Idaho Constitution (*Appendix D*, p. 412a), provides an elected county sheriff the right to terminate, because of the right to appoint. "Minimum procedural requirements", however, are federal law, and cannot be diminished by State procedures. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, at 432 (1982). "Any other conclusion would allow the State to destroy at will virtually any state-created property interest". *Id.* The adequacy of statutory procedures for deprivation of a right must be analyzed in **constitutional** terms. Article 18, § 6, Idaho Constitution, can never be allowed to mean a sheriff has the final right to **terminate** an employee, as the employee must be provided **adequate procedure** to **review** a violation

or deprivation of **procedural due process**.

State District Court – Judicial Review

After the Board rejected an administrative agency review hearing, Ms. Gibson sought judicial review of that rejection with a Petition For Judicial Review; the District Court denied relief (*Appendix 23*, p. 146a-148a), and stated, "There exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decisions of other elected County officers". (The District Court accepted the unconstitutional argument of "finality" of a sheriff's decision).

Idaho Supreme Court – Writ Of Mandamus

Ms. Gibson sought relief from in the form of a Petition For Writ(s) Of Mandamus (*Appendix 27*, p. 158a-173a); requested a plain and speedy remedy to direct Ada County to reinstate employment, or allow procedural due process and proceed with an administrative agency hearing to create a factual record for judicial review. The Petition was denied (*Appendix* 26, p. 156-157).

Idaho Supreme Court – Declaratory Judgment

In *Gibson v. Ada County, et al.*, 142 Idaho 746, 133 P.3d 1211 (2006), the Idaho Supreme Court concluded, "Gibson was given a **pre**-termination hearing by way of the hearing conducted on February 15, 2000 [the Court was referring to the biased "post"-termination hearing held January 25th and 26th, 2000]. *See Appendix 1*, at page 16a. That factual error was met with a contradiction to its earlier decision on the issue of the *Administrative Procedure Act* in Idaho. Petitioner requested the Court enter declaratory judgment, since § 1-7G-3(O) of the County Code was held infirm, unconstitutional, contrary to procedural due process requirements, and repugnant in law.

The Court stated in *Gibson v. Ada County, et al.*, 142 Idaho 746:

> "It appears Gibson has ignored another Idaho Code section that clarifies how one properly requests a declaratory judgment" [Idaho Code § 67-5272(1)], and "Gibson's

request is outside the scope of this appeal and, therefore, this Court declines to review it". *Appendix 1*, p. 22a-23a.

What is profoundly interesting by this remark, is § 67-5272(1), *Idaho Code*, is "a" procedure found within the *Idaho Administrative Procedures Act*, and in *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, the Court held, "The Idaho Administrative Procedure[s] Act Does Not Govern This Action". *Appendix 38*, p. 222a-223a.

Pursuant to Article V, § 9, Idaho Constitution, and § 10-1201, *Idaho Code*, the Idaho Supreme Court is **authorized** with **original jurisdiction** to issue declaratory judgments in appropriate situations, as provided for in § 10-1202, *Idaho Code*. *See Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). § 10-1202 , *Idaho Code*, states:

> "Any person...whose **rights**, status or other legal relations are **affected by** a...**ordinance**, **contract** or franchise, may have determined any **question of construction** or validity arising under the...**ordinance**, **contract** or franchise and obtain a **declaration of rights**, **status** or other **legal relations** thereunder".

A declaratory judgment, to declare legal rights, has before been acknowledged by the Idaho courts. *See Nelson v. Whitesides*, 103 Idaho 374, 647 P.2d 1246 (1982).

To confuse matters, and to announce another legal contradiction with federal law, the Idaho Court concluded in *Gibson v. Ada County, et al.*, 142 Idaho 746, "Gibson was given a **pre**-termination hearing by way of the hearing conducted on February 15, 2000" (*Appendix 1*, p. 16a). This Idaho Court must have misconstrued *Parratt v. Taylor*, 451 U.S. 527, 537 (1981), believing the termination was a "random and unauthorized" act, rather than established procedure under the County's established Merit System, authorized by state law.

With two legal contradictions over established precedent, and factual error as to the definition of pre-termination proceedings, it is no wonder Petitioner questions Idaho's perception of the Due Process Clause under federal law.

In keeping with Petitioner's Question No. V, the Idaho Supreme Court is capable of entering conclusions contrary to federal authority, as we are given witness to contradictions over statutes that gives one to consider a "result oriented" attitude to insulate against governmental liability. To add further concern, in *Sanchez v. State of Idaho, Department of Corrections*, ___ Idaho ___, Docket No. 32266, filed August 8, 2006, the Honorable Justice Eismann chose his words carefully and stated, "Although **this Court has** the **power to misconstrue statutes**, it does not have the power to rewrite them". Are constitutional guarantees subject to the same power of misconstruction?

Idaho Supreme Court – Writ Of Certiorari

As a last resort to find adequate procedure to review Petitioner's claims, a Petition For Writ Of Certiorari was submitted to the Idaho Supreme Court (*Appendix 4 & 5*, p. 36a-59a), stating:

> "Ada County and the Idaho courts have not provided Gibson with an adequate remedy for the deprivation of her property rights under the Due Process Clause of the 14th Amendment. Faced with an inferior governmental administrative agency, acting under color of state law that has deprived Gibson of the procedural guarantee protected by the 14th Amendment, and the lack of an adequate state remedy, the Federal court would have jurisdiction and authority to proceed with the adjudication of Federal due process claims. See *Horton v. Bd., Cnty. Com'rs, Flagler Cnty.*, 202 F.3d 1297, at 1300 (11th Cir. 2000)".

This Petition was also denied (*Appendix 3*, p. 34a-35a).

Federal District Court – Title 42 Action

With no venue to remedy these violations under the 14th Amendment of the U.S. Constitution, a complaint was filed with the U.S. District Court of Idaho. *See Gibson v. Ada County, et al.*, Case No. CV05-263-S-EJL. That court acknowledged Ms. Gibson sought remedy of her rights to procedural due process, equal protection, and right to judicial

access (*Appendix 81*, p. 552a-588a), but the court dismissed the action under issue/claim/*res judicata* preclusion because of the State proceedings (*Appendix 82*, p. 605a). That dismissal is on appeal to the 9th Circuit Court under Case No. 06-35600. The preclusion theory should not have been the basis to dismiss, but rather demonstrate a cause of action has accrued for denial of procedural due process.

SUMMARY AND CONCLUSION

A classified, tenured employee can be terminated only for cause, and **must** be subject to due process procedural **review**, as a matter of federal law. The State has denied any adequate procedural due process review of the official action, and denied review of the violations of due process under the 14th Amendment, protected under 42 U.S.C. § 1983.

Federal courts have dealt with due process violations similar to Ms. Gibson, as announced in *Terlecky v. Downs*, No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, March 27, 2006. *See also McNulty v. Sandoval County*, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005. In its Opinion on January 24, 2006, the *Terlecky* court ordered immediate reinstatement, and stated the personnel manual allowed appeal to state courts from decisions of council members, even though no statutory authorization was provided.

Petitioner has been denied adequate state procedures to satisfy procedural due process, and this Court must grant Certiorari to apply existing federal law.

Respectfully submitted,

Vernon K. Smith
1900 West Main Street
Boise, Idaho 83702
(208) 345-1125

Attorney For Petitioner

APPENDIX 80 – VERIFIED COMPLAINT IN THE MATTER OF *STACY A. GIBSON V. ADA COUNTY, ET AL*, CV OC 0205601D, FILED JULY 19, 2002

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

COMPLAINT AND DEMAND FOR JURY TRIAL

Filed: July 19, 2002

STACY A. GIBSON[1],

Petitioner,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Respondents.

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[1] Idaho Supreme Court Docket No. 29694

Appendix 80

COMES NOW The Plaintiff above named, and complains of the Defendants, and for her cause of action does allege as follows:

GENERAL ALLEGATIONS

I.

That Plaintiff, at all times mentioned herein, was a citizen of the United States of America, a resident of the State of Idaho, and at the time the events were occurring as alleged herein, was a resident of Ada County, Idaho.

II.

That Defendants, Ada County is a political subdivision of the State of Idaho; that Ada County Sheriff's Office is a Department within that political subdivision of Ada County; that Vaughn Killeen, Arville Glenn and Scott Johnson, are each individuals, and were acting as law enforcement officials under the color of State Law in their respective capacities as said Killeen was the Ada County Sheriff, and said Glenn and Johnson were the Sheriff Deputies and Detectives, respectively, and at all times herein, were engaged in that official capacity through the exercise of their power and authority, under color of State Law.

III.

That Defendant, R. Monte MacConnell, is an individual employed by Ada County as the Legal Advisor to the Ada County Sheriff, and as an Ada County employee, is subject to the provisions of Ada County Code, § 1-7-1B (2) (b) (4), and was acting in his official capacity as the legal advisor at all times herein while engaged in that official capacity, through

the exercise of his power and authority, under said color of State Law, and extended to him by Ada County and the Ada County Sheriff.

IV.

That Plaintiff is uncertain as to the true names and official capacities of Does I thru X, and does reserve the right to amend these pleadings to later identify other officials who had an official involvement through the exercise of power and authority under color of State Law as their actions relate to the events that gave rise to Plaintiff's claim, and at such time that such identities become known to Plaintiff, their names will be substituted into this proceeding, through an amended complaint, and Plaintiff does reserve the right to submit an amended complaint as allowed by Rule 10 (a) (4), I.R.C.P., upon the subsequent identification of those further officials acting under color of State Law.

V.

This action does arise under the United States Constitution, under the provisions of the Fourth, Sixth and Fourteenth Amendments to said Constitution, under Federal Law, and as particularly authorized for Civil Rights violations under Title 42 U.S.C., §§ 1981, 1983 and 1985 (3).

VI.

That the District Court, Fourth Judicial District, State of Idaho, County of Ada, does have and is empowered to exercise concurrent jurisdiction with and between the Federal and State Courts over actions arising under Federal Civil Rights statutes, including Title 42 U.S.C., §§ 1981, 1983 and 1985 (3), by virtue of Title 28 U.S.C., § 1343.

VII.

That the acts of the individual Defendants, as alleged herein, were being pursued in their official capacity as Ada County Sheriff law enforcement officials, acting as Sheriff, Deputies, Detectives, and legal advisor, respectively, under color of State Law and under their employment with Ada County, and through the authority of their office within the law enforcement department(s) of said Ada County, a governmental entity with whom they are employed.

VIII.

That Plaintiff did submit her employment application to the Ada County Sheriff's Office, a Department of Ada County, on April 22, 1997.

IX.

That Plaintiff did agree to the Ada County Sheriff's Office Hiring Standards on April 29, 1997, and the provisions of the Ada County Personnel System announced in the Ada County Code.

X.

That Plaintiff did complete all assessments made of her, and was hired as a Records Clerk, assigned to the Boise State University (BSU) Substation of the Sheriff's Office, at a base monthly salary of $1,215.00, effective July 10, 1997.

XI.

That compensation for Plaintiff's employment with Ada County Sheriff's Office was pursuant to and controlled by the provisions of the Ada County Sheriff's Office Policy Manual,

by Ada County Code, § 1-7C-1 *et seq.*, and in all respect was subject to and regulated by the terms and provisions of the Federal *Fair Labor Standards* Act, Title 29 U.S.C., § 201 *et seq* (FLSA), and the *Idaho Public Employees Protection Act*, § 6-2101 *et seq.*, Idaho Code.

XII.

That Plaintiff's employment was made, governed and protected by the provisions of various Federal, State and County laws, including the Ada County Sheriff's Office Policy Manual, Ada County Code, including the County Personnel System, Chapter 7 thereof, and the provisions of that Federal enactment, known as the Federal *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, and in accordance with the *Idaho Public Employees Protection Act*, § 6-2101 *et seq.*, Idaho Code.

XIII.

That Plaintiff did, as an employee of Ada County, acknowledge and agree to Ada County's policy against discrimination of employees, on July 24, 1997.

XIV.

That on July 24, 1997, Plaintiff was appointed to the position of a Noncommissioned Deputy of Ada County, by Captain Gil Wright, acting in his official capacity for the Sheriff of Ada County.

XV.

That Plaintiff was required to and did obtain, understand and comply with the provisions contained within the Ada

County Sheriff's Office Policy Manual, as directed in § 1.01 thereof.

XVI.

That from July 10, 1997 to August 1, 1998, Plaintiff was given probationary status as defined by Ada County Code, § 1-7E-1A, and during that period of probationary status, Plaintiff did exceed the established requirements of her employment, as confirmed by the eight Monthly Evaluation Reports.

XVII.

That on July 29, 1998, Plaintiff was recommended to receive "Permanent Status" employment, pursuant to Ada County Code, § 1-7E-2A & B and § 1-7B-1.

XVIII.

That Plaintiff was granted permanent status and became a "classified employee", effective August 1, 1998, as defined by Ada County Code, § 1-7B-1, pursuant to the provisions of Ada County Code, § 1-7E-2A & B and § 1-7B-1, and Plaintiff was entitled to all rights and the protection afforded her as a "classified employee" with certain established and vested property rights attendant thereto.

XIX.

That in prior months, and in particular, on April 22, 1998, the Ada County Commissioners sent letters to County Employees, requesting participation in the County's Direct Deposit Program, where the County would automatically deposit monthly pay into an employees' bank account. The

benefits of such participation was represented to be a savings to the County of approximately $167.00 a year, and specifically stated: "Your monthly pay will automatically be deposited into a checking or savings account of your choice without any action by you."

XX.

That Plaintiff submitted the Automatic Paycheck Deposit Authorization form on May 6, 1998, and by agreeing to such authorization, did thereby authorize Ada County to "initiate, if necessary, debit entries and adjustments for any credit entries in error to my (her) account indicated above".

XXI.

That in January 1998, Plaintiff was approved for transfer and promotion to the Sheriff's Jail Facility, as a Jail Technician II, and Plaintiff was transferred to Jail Technician II, effective October 16, 1998.

XXII.

That from July 10, 1997 through October 15, 1998, and on a regular monthly basis, Plaintiff was required to sign incorrect "pay vouchers", at times also called "claim forms." Plaintiff was told by Ada County Payroll personnel, "you will not be paid until you endorse the pay vouchers, even though the vouchers are in error". Pursuant to Ada County Code, § 1-7C-3B, "employees will receive their paycheck the last working day of each month", and said directive to require Plaintiff to sign incorrect documents before receiving any entitlement to earned pay, was not a condition contained within the Sheriff's Policy Manual, Ada County Code,

County Personnel System or the *Fair Labor Standards Act*, and to the contrary, the Ada County Payroll Department was not providing accurate payroll and accounting records as intended and required by Idaho Code, § 31-1509, or as mandated by said FLSA, Title 29, U.S.C., § 211 (c), which states in part, the employer "shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, …..".

XXIII.

That in October 1998, Ada County Payroll Department did mistakenly create an administrative error in Plaintiff's wages because of her job assignments. Pursuant to Ada County Code, § 1-7C-5A, Plaintiff should have received her promotional five percent (5%) increase from $1,500.00 monthly to $1,575.00 monthly, for service as a Jail Technician II, but instead, was paid $1,550.00 as indicated in the Notice of Personnel Action. That by virtue of such record keeping administrative error, such error and omission did constitute a violation of Title 29 U.S.C., § 211 (c), being a record keeping provision of said FLSA.

XXIV.

That sometime after November 1, 1998 and before November 30, 1998, Ada County Payroll Department did further perpetuate another and more erroneous pay distribution error by mistakenly creating another record keeping administrative error regarding Plaintiff's wage, not only in the erroneous process by which Payroll combined Plaintiff's monthly wages for what they incorrectly and erroneously assessed to be two (2) different jobs, but also by

mistakenly and erroneously calculating her pay raise and overtime wages, the combined effect of which caused errors and omissions to occur that resulted in an overpayment made by direct deposit to the joint account of Plaintiff and her husband, for a period of eight (8) consecutive months by said Payroll Department, who had the debit and credit authority on such account. At the time this error was created, Plaintiff was fully classified as a permanent status employee, and had vested rights under such tenured status, and was to receive all entitlements and protection under the *Fair Labor Standards Act* (FLSA), 29 U.S.C § 201 *et seq.* and the *Idaho Public Employees Protection Act*, § 6-2101 *et seq.*, Idaho Code, as announced in accordance with the provisions contained in the Ada County Code, County Personnel System, § 1-7C-1 through § 1-7C-10 and as declared by Idaho statute.

XXV.

That Plaintiff does allege, and as a matter of law, does aver that every employer who is subject to the provisions of the *Fair Labor Standards Act*, is required to make, keep, and preserve wage records of hours worked and of other information of its employees for payment as prescribed by the regulations issued by the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to 29 U.S.C., § 211 (c), and case law.

XXVI.

That Plaintiff does allege, and as a matter of law, does aver that when the employer has failed to maintain adequate and accurate records for pay disbursement as required by law and regulations, the employer cannot contend any amounts owing their employees could not be ascertained with

mathematical exactitude, as the inability to ascertain payment and the erroneous consequences thereof, is the result of the employer's failure to comply with the record-keeping requirements of the *Fair Labor Standards Act*.

XXVII.

That Plaintiff does allege, and as a matter of law, does aver that the *Fair Labor Standards Act* has placed the duty of keeping accurate records of hours worked upon the employer, and when the employer makes any attempt to transfer that responsibility to the employee, the employer does so at his own peril under the provisions of Title 29, U.S.C. § 211, Fact Sheet No. 021, U.S. Department of Labor, Wage and Hour Division, and Code of Federal Regulations, Title 29, §§ 516.1 and 516.2, and case law.

XXVIII.

That Plaintiff does allege, and as a matter of law, does aver that the employer Ada County is subject to the provisions of said *Fair Labor Standards Act*, and cannot fault the employee with receiving excess pay, under such error and omission, whereby the employer mistakenly deposited funds and were unknowingly received in the employee's account by the direct deposit initiated and controlled by the employer, as the said employer has the sole duty to keep accurate pay records from which payments and disbursements are made.

XXIX.

That by January 13, 1999, Plaintiff, still unaware of the administrative errors, did complete all Jail training, and did receive three (3) exemplary Evaluation Reports. In the

reports, Sergeant Wellman did state (in his reviews of February 13, 1999 and March 17, 1999), that Plaintiff was "very self motivated" and "an asset to the Sheriff's Department". That in the third evaluation (June 14, 1999), Sergeant Ishiyama certified Plaintiff had then completed five (5) correspondence courses on jail techniques, all of which training occurred on her own time.

XXX.

That Plaintiff did complete 204 hours of approved technician courses, between January 20, 1999, and June 17, 1999, which occurred during Plaintiff's off-duty time.

XXXI.

That Plaintiff did volunteer for and was approved for additional overtime hours, due to her advanced training, and from January 1999 through June 1999, Plaintiff did work 281 hours overtime. That of those accrued overtime hours, 128 hours was taken as "cash compensation", and 153 hours was held in Plaintiff's "compensatory time" reserve for future use and discretion. That Plaintiff does allege, and as a matter of law, doe aver that under the Federal *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 207 (k) and the *Code of Federal Regulations*, Title 29, § 553.230, every employee protected under said FLSA begins to accrue overtime compensation once the sum of 171 hours is worked within a twenty-eight (28) day period.

XXXII.

That from October 16, 1998 through July 20, 1999, Defendant had worked her 112 scheduled regular shifts (12

hours each), and did report as was required to report to her workstation fifteen (15) minutes prior to the start of each work shift, for mandatory Jail briefing.

XXXIII.

That from January 1, 1999 through June 30, 1999, Plaintiff did work, her scheduled regular shifts, did report as directed, and did accrue overtime of 281 hours, and did complete 204 hours of approved course study to benefit the Sheriff's Office only, as it related to jail supervision, and as a result thereof, Plaintiff had no time to challenge the capabilities or accuracies of the County Payroll Department computations, having prioritized her commitments to performing County work schedules, County overtime hours, and County course studies.

XXXIV.

That Plaintiff does allege, and as a matter of law, does aver that the employer cannot escape, delegate, or infer the record-keeping duty imposed by the *Fair Labor Standards Act* upon anyone else, as the employer has the duty to inquire into any and all conditions of the business and wages, and cannot be relieved of the duty by choosing to rely on subordinate activities. The record-keeping obligation is not discharged by any attempt of promulgation by the employer.

XXXV.

That Kelli Bolicek, Budget Director at the Sheriff's Office, did discover the administrative overpayment errors alleged above, and stated:, "I had asked payroll downtown to send me a list of all people that have two jobs out there and

their overtime for the year". Ms. Bolicek did contact Merrily Wilfong on July 19, 1999, requesting a copy of the overtime sheets for Ada County Sheriff's Office employees who were shorted pay from October 1998 through June 1999. That in fact, Ms. Bolicek was working at the time with the payroll system, connecting two (2) jobs to an employee, in situations where Federal grant money was funding one of the assigned jobs; that Payroll system errors were showing up in the differentiation between jobs, and County Payroll believed they owed at least nine (9) employees overtime from October 1998 through June 1999, due to record keeping errors, and Ms. Bolicek discovered Plaintiff's name appeared on the list, for it was believed Plaintiff was also shorted overtime pay, but later determined Plaintiff was not a "grant" employee, and determined instead an overpayment error occurred within the Payroll Department.

XXXVI.

That Ada County Sheriff's Office, the Ada County Payroll Department, and the Ada County Sheriff's Office Budget Director were each delegating the responsibility of keeping payroll records to various non-management employees, contrary to the *Fair Labor Standards Act*. That Plaintiff does allege, and as a matter of law, does aver that the responsibilities imposed by 29 U.S.C., § 211 (c) belong solely to the employer, Ada County, and said County cannot escape that responsibility by attempting to delegate record keeping to or the acceptance thereof to the injured employee.

XXXVII.

That on July 20, 1999, Detective Glenn did meet Detective Johnson and together did discuss the administrative errors made in direct deposits to Plaintiff's joint account; that on that date, while Plaintiff was resting at home, on medical leave, and recovering from surgery, said Glenn telephoned Plaintiff, requesting she come to the Sheriff's Office, whereupon Plaintiff did comply and did meet him at 3:00 p.m., believing it was a "special duty" work assignment needed upon her return to work after recovery.

XXXVIII.

That Detective Glenn did thereupon commence a threatening interrogation of Plaintiff, attempting in that process to orchestrate criminal charges against Plaintiff over said deposits, notwithstanding the deposits were the result of the County's own administrative error. This conduct was pursued in a most arbitrary, inappropriate, and capricious manner by said Glenn; that Detective Glenn called Plaintiff a liar, a thief, and threatened her with jail, and acted as though he was blind to the fact Plaintiff's pay was processed through a direct deposit system by the County, and neither Plaintiff nor her husband ever saw a paycheck or deposit slip. That in fact, said Detective Glenn did full well know the mistake was the result of an administrative errors, caused by inaccurate payroll and wage keeping practices.

XXXIX.

That Plaintiff does allege, and as a matter of policy and law, does aver that § 7.05 (4) of the Ada County Sheriff's Office Policy Manual, underwritten and approved by Sheriff Vaughn Killeen, does forbid threats of any punitive action

against a member of the Sheriff's Office, as Plaintiff was then a member, and by the County's acts, she was then regarded as a Sheriff's Office member under investigation.

XL.

That Detective Glenn pursued his accusatory actions throughout his affront towards Plaintiff, and despite his access to Sheriff Office work records, did wrongfully accuse Plaintiff of working less overtime hours.

XLI.

That Plaintiff does allege, and as a matter of policy and law, does aver that said Title 29 U.S.C., § 211 (c) mandates the employer's responsibility to always maintain accurate wage, pay and hourly records in an effort to avoid such false allegations and violations of protected rights as was undertaken and did occur here.

XLII.

That during said interrogation, Detective Glenn did then disclose the fact he knew it was all over an "administrative error"; that Glenn knew Plaintiff did nothing wrong, and somebody else had erred in depositing the checks.

XLIII.

That Plaintiff does allege, and as a matter of policy and law, does aver that said Title 29 U.S.C., § 211 (c) mandates the employer's responsibility to always maintain accurate records in an effort to avoid such erroneous disbursements and arbitrary acts of gross misconduct in a confrontational

setting, and violation of protected rights as was undertaken and did occur here.

XLIV.

That during said interrogation, Detective Glenn did falsely accuse Plaintiff with the design to develop some plan for the mistaken deposits; that Sergeant Johnson then threatened Plaintiff with the criminal charge of embezzlement, and Johnson told Plaintiff she was: "suspended"; that notwithstanding said threats, said § 7.05 (4) of the Ada County Sheriff's Office Policy Manual, as alleged above, does forbid threats of any punitive action against a member of the Sheriff's Office, as Plaintiff was then a member, and as known to said Glenn and Johnson, Plaintiff was then regarded as a Sheriff's Office member under investigation.

XLV.

That on Wednesday, July 28, 1999, said R. Monte MacConnell, the Sheriff's Legal Advisor, in further execution of the conspiracy to separate Plaintiff from her employment, did state and confirm Deputy Gibson was to be "terminated" as decided by the Sheriff, and did further state if Plaintiff did not resign from the Sheriff's Office, the Sheriff would want her processed with felony charges for grand theft, attempting to influence Plaintiff's decision over the right to and issue of retained employment, herein alleged to be a violation of Idaho Code, § 18-1353, as such action was intended to influence Plaintiff's decision in a pending administrative proceeding regarding the retention, resignation or termination of Plaintiff's employment.

Appendix 80

XLVI.

That Plaintiff does allege, and as a matter of law, does aver that not only was this threat of Plaintiff's termination a violation of the *Fair Labor Standards Act*, 29 U.S.C., § 215 (a) (3), but also was an attempt to thwart procedural law, as announced in Cleveland Board of Education v Loudermill, 470 US 532 (1985), wherein the U.S. Supreme Court declared a "classified" employee is entitled to a "pretermination" hearing prior to the commencement or intent of any termination proceedings. Plaintiff was never given such hearing prior to the formulated decision of termination.

XLVII.

Plaintiff had asserted her rights and was protected from any such action of termination or discrimination, under the provisions of Ada County Code, § 1-7C-1, and as mandated by the *Fair Labor Standards Act*, 29 U.S.C., § 201 *et seq.* and specifically Title 29 U.S.C., § 215 (a) (3) does state:

> "it shall be unlawful for any person (including a public agency) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be institute any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or ....." (Emphasis added).

XLVIII.

That Plaintiff refused to resign under this felonious threat of criminal conduct, which then forced the Sheriff to

deliver his Notice of Intent to Impose Discipline upon Plaintiff on August 2, 1999. That Plaintiff does allege, and as a matter of law, does aver that such action was pursued in violation of 29 U.S.C., § 215 (a) (3).

XLIX.

That on August 6, 1999, pursuant to Ada County Code § 1-7G-3D, Plaintiff denied the allegations contained in the Sheriff's Notice of Intent to Impose Discipline, and exercised her right to respond.

L.

That on August 11, 1999, the Sheriff's Legal Advisor identified above, did confirm receipt of correspondence, and did submit Plaintiff's July paycheck along with the "pay voucher" or "claim form", which continued to show the incorrect salary reference of $1,550.00.

LI.

That on August 9, 1999, Greg H. Bower, acting in his capacity as the Ada County Prosecutor, sent correspondence to Mr. John Christensen, acting in his capacity as Chief Criminal Prosecutor in Canyon County, Idaho, and therein said Bower did represent he was granting authorization to said Christensen "to file charges in this case...", and therein stated "I will have you appointed as special prosecutor". This communication was issued in a manner contrary to statute, and for the intended benefit of Ada County, undertaken in an effort to seek a malicious prosecution, as Plaintiff

does allege such conduct is not authorized by Idaho Code §31-2603 (a) or Title 29 U.S.C., § 201 *et seq.*; that such letter of represented "authorization" was undertaken for the direct benefit of the Ada County Sheriff, designed to carry forward the County Sheriff's threat of criminal charges as before delivered to frighten Plaintiff, constituting ongoing acts of arbitrary and discriminatory behavior, pursued for no lawful purpose.

LII.

That on August 20, 1999, Chief Criminal Deputy Canyon County Prosecutor, John Christensen, acting in his official capacity, determined criminal charges were "inappropriate"; that notwithstanding that determination, the Ada County Prosecuting Attorney, Greg H. Bower, undertook further inappropriate efforts by submitting the letter of August 25, 1999, to the Sheriff's Budget Director, announcing certain events, yet knowing said Director had no authorized right to access investigatory records, reports, or information of such classified nature.

LIII.

That on August 23, 1999, the County Sheriff Legal Advisor, identified above, requested Plaintiff to accept Administrative Leave Without Pay. Plaintiff declined that request, but agreed if, Ada County would continue all medical benefits coverage, during all periods of administrative leave, needed for the acute depression, insomnia and anxiety attacks that had resulted from this psychological injury from the County's misconduct, she would, and only then would, agree to Leave Without Pay. Plaintiff caused a letter to be sent to confirm what she would

agree to, and identified the only status of non-pay she would accept regarding Administrative Leave. That notwithstanding said letter and contrary to established County employee policy and Title 29, U.S.C., § 201 *et seq.*, the said Sheriff's Legal Advisor, acting on behalf of the Sheriff, did place Plaintiff on Administrative Leave Without Pay, and did also cause her medical benefits to be cancelled. That event was memorialized by letter of August 25, 1999, violating the express condition of Leave as set by Plaintiff, and Plaintiff does allege such action was a violation of Ada County Code, § 1-7G-3, setting forth the exact and specific conditions upon which an employee can be placed on Administrative Leave Without Pay. That said conduct by said R. Monte MacConnell was known by him to bring about a sequence of events that would prove to be devastating to Plaintiff and her family, and cause resulting injury and damage to Plaintiff, of a financial nature.

LIV.

That on October 5, 1999, after being threatened with prosecution, and placed on Administrative Leave Without Pay, and accused of false accusations of grand theft and embezzlement, and denied her right to medical benefits, the County Sheriff "ordered" Plaintiff to report to the County Jail Facility, at 1:00 p.m., to be diagnosed by the County Physician, Dr. Charles Steuart, to determine her medical state. Plaintiff did, in the company of her husband, go to the Jail Facility as "ordered", and met Dr. Steuart for a period of time as required and was paraded past other employees in the Jail, and underwent the diagnosis by Dr. Steuart, who generated his diagnosis and prognosis assessment, and confirmed Plaintiff's psychological injuries.

LV.

That at that time and while Plaintiff was paraded in the presence of other employees in the Jail Facility, Plaintiff did discover her 'inbox' had been removed, and all indicia of her employment had been eliminated from the facility prior to her diagnosis with Dr. Steuart on October 5, 1999.

LVI.

That on February 1, 2000, Ada County Payroll Department did issue a Notice of Personnel Action, then attempting to correct a portion of the error, thereby correcting the erroneous salary of $1,550.00 to indicate the correct salary of $1,575.00.

LVII.

That Plaintiff thereafter was officially deemed to be and was given terminated status on February 15, 2000, in violation of Title 29 U.S.C., § 215 (a) (3), as she was terminated only for reasons caused by the administrative error in the record keeping process, for which Plaintiff was being blamed for and held charged responsible therefor, a position and decision taken by Ada County that was contrary to law.

LVIII.

That Plaintiff thereafter hired Larry Stewart, Licensed Public Accountant, to review pay records available to Plaintiff, and said accountant did confirm various discrepancies did exist in wages and compensation due Plaintiff, both as to what was reported on her W-2 Form, and

when compared to pay vouchers, claim forms, records and pay documents generated by Ada County.

SPECIFIC ALLEGATIONS

COUNT I

LIX.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LVIII above, inclusive, as those said allegations were set forth and contained in full herein.

LX.

That at all times relevant to this Complaint, said Ada County and its Sheriff's Office was a public body, and was acting as an "employer" as defined by § 6-2103 (4) (a) and (5) (c), Idaho Code.

LXI.

That at all times relevant to this Complaint, said Plaintiff was an "employee" of said Ada County, and specifically Ada County Sheriff's Office as defined by § 6-2101 (3), Idaho Code.

LXII.

That at all times relevant to this Complaint, Plaintiff had established civil rights and property interests by virtue of her being classified as a permanent status employee with Ada County, who was given vested rights as did accrue to her

under her tenured status, and had the right to entitlements and to those protections afforded to her under Idaho Code, § 6-2101 *et* seq. and the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, as carried into the provisions and enforced under the Ada County Personnel System, identified in § 1-7C-1 through § 1-7C-10, Ada County Code, and entitled to receive all rights, entitlements and protections that have been denied her by the Defendants herein, for which Plaintiff is entitled to be fully reinstated and be compensated for all damages incurred as a result of the wrongful actions of said Defendants.

COUNT II

LXIII.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXII above, inclusive, as though said allegations were set forth and contained in full herein.

LXIV.

That on July 20, 1999, said Defendants Glenn and Johnson, upon the pretense of an internal investigation of a department member, as ordered by the Ada County Sheriff, Vaughn Killeen, did conspire to act in a manner that did compromise and deprive Plaintiff of equal protection under the law, and thereupon violate Plaintiff's rights, guaranteed to her by statute and by her vested constitutional rights, by detaining, interrogating, confronting and accusing Plaintiff of criminal acts, all of which was allowed to occur under false pretenses.

Appendix 80

LXV.

That commencing on July 20, 1999, said law enforcement officials, namely Sheriff Killeen, Glenn and Johnson, did conspire and wrongfully, unlawfully, without just cause or a factual or legal basis, and without a credible or reliable source of information to substantiate the belief Plaintiff had committed any criminal offenses, did then arbitrarily, capriciously, maliciously, and with reckless indifference, and in violation of Plaintiff's rights, choose to detain and confine Plaintiff for the purposes of interrogating, falsely accusing, intimidating, and threatening Plaintiff with criminal charges, and jail time for the purported charge of grand theft and/or embezzlement.

LXVI.

That at no time did Plaintiff engage in any acts that would constitute a factual basis for Plaintiff to be subjected to the wrongful treatment, as alleged, or to charge Plaintiff with the felonious act of grand theft or embezzlement; that at no time were the necessary elements present to establish that Plaintiff did in any manner commit a criminal act, or have any probable cause to believe any event was coupled therewith the element of any general or specific criminal intent; that at no time did any of the law enforcement Defendants herein ever come into possession of any basis, in fact or law, that would justify any basis for a decision to detain, accuse, threaten or charge said Plaintiff, and at no time was there ever in existence any good faith belief based upon any credible or reliable evidence or probable cause that a criminal act had been committed, or that an existing victim has resulted from any perceived act or falsely claimed criminal act, as alleged,

or as was threatened by said law enforcement Defendants at the time of Plaintiff's detainment, or anytime thereafter.

LXVII.

That the conspiratorial efforts to orchestrate a criminal charge was in fact being brought to the Ada County Prosecutor's Office without any factual cause, probable cause or good faith merit whatsoever, and knowing no basis existed, the case was still "conflicted" to the Canyon County Prosecutor's Office in an effort to cause charges to be filed with the Court; that the false assertions were declared "inappropriate" by the Canyon County Prosecutor's Office for the specific reasons no credible evidence, probable cause, factual basis or good faith cause existed to support the accusations, and there existed no witness or victims to support any such purported or fabricated accusation, and the apparent failure of the investigation by law enforcement officials to produce any basis to justify or sustain the detainment and filing of such false charges was only then abandoned and never pursued thereafter.

LXVIII.

That at all times known to said law enforcement officials, there did never exist any good faith basis to believe the accusations had any validity, and there was never any good faith attempt being pursued in any efforts to file felonious charges against Plaintiff, yet notwithstanding that fact, said conduct was pursued by said law enforcement Defendant officials, under their power and authority under color of State Law, and as a result thereof, did cause injury and financial loss for which Plaintiff is entitled to be fully compensated and

receive an award for all damages incurred by such wrongful conduct.

COUNT III

LXIX.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXVIII above, inclusive, as though said allegations were set forth and contained in full herein.

LXX.

That as a result of the wrongful unlawful and conspiratorial actions of said law enforcement officials, including Sheriff Vaughn Killeen, Deputy Glenn and Deputy Johnson, said Plaintiff did sustain severe psychological injury, and was placed under the medical care and treatment of Dr. Stephen E. Spencer, which medical care commenced on July 22, 1999, and Plaintiff has continually been under the care of Dr. Spencer who has prescribed a series of different medications to treat the situational depression, anxiety, emotional duress, traumatic syndrome disorder, post-traumatic stress disorder, and allergic reactions to the medicinal stabilizing factors utilized in her care, treatment, diagnosis and prognosis of this inflicted condition; that Plaintiff is entitled to be fully compensated and receive an award for all damages incurred by such wrongful conduct.

COUNT IV

LXXI.

Appendix 80

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXX above, inclusive, as though said allegations were set forth and contained in full herein.

LXXII.

That on Wednesday, July 28, 1999, Plaintiff's counsel did have a telephone conversation with said MacConnell, Legal Advisor for the Ada County Sheriff's Office and then acting in that capacity, and during that conversation said MacConnell did want to secure a resolution of separation of Plaintiff's employment then before him because of the series of overpayments made by Ada County to the account of Stacy and John Gibson under the Direct Deposit Program; that said MacConnell stated to Plaintiff's counsel: "the Sheriff (Vaughn Killeen), wanted Deputy Gibson terminated, but if Ms. Gibson would voluntarily resign from the Ada County Sheriff's Office, that would resolve the matter, and if she refused to resign, she would immediately be processed with felony charges by the Sheriff concerning those funds deposited to that account, and as a result of that conduct, did cause further physical and psychological injury, mental pain, anguish and financial losses and expenses to occur, for which Plaintiff is entitled to be compensated for all such damages incurred as a result of the conspiracy wrongful actions of said Defendants.

COUNT V

LXXIII.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXXII above,

inclusive, as though said allegations were set forth and contained in full herein.

LXXIV.

That during discussions on August 23, 1999 between the Sheriff's Legal Advisor, R. Monte MacConnell, and counsel for Plaintiff, Plaintiff was requested to accept Administrative Leave Without Pay, and in response thereto Plaintiff declined that request but did agree that as long as Plaintiff's medical benefits coverage continued, without interruption, during any period of Administrative Leave, Plaintiff would cooperate with any investigation and consent to Leave. The assurance of continuing benefit coverage was critical to Plaintiff as her health was in jeopardy as she suffered greatly as the result of the treatment she sustained by the Ada County agents and personnel on July 20, 1999, and as a result thereof did cause Plaintiff to incur medical expenses.

LXXV.

That Plaintiff caused a letter to be sent to Ada County to confirm the basis upon which Plaintiff would cooperate and endure a status of non-pay and Administrative Leave, but only upon the assurance of uninterrupted continuation of her medical coverage benefits.

LXXVI.

That notwithstanding Plaintiff's efforts to act in good faith, and extend her cooperation, the Legal Advisor, R. Monte MacConnell, acting for and on behalf of the Sheriff, ignored the good faith

resolution and disregarded Plaintiff's letter, and did immediately place Plaintiff on Administrative Leave Without Pay, and did immediately cancel Plaintiff's medical coverage benefits entirely, and effective as of August 24, 1999, as reflected in the County's letter of August 25, 1999.

LXXVII.

That the events of said cancellation and unpaid leave, undertaken by the County Sheriff's Legal Advisor, R. Monte MacConnell, acting in behalf of the Sheriff on August 24, 1999, did consequently cause Plaintiff to be classified as on Administrative Leave, Without Pay, and did result in the cancellation of all of Plaintiff's medical benefits forthwith, and the effects of which were the result of this arbitrary and capricious act undertaken in violation of Ada County Code, § 1-7G-3, which provisions therein were uniquely specific to when an employee could be placed on unpaid Leave.

LXXVIII.

That said placement of Plaintiff upon Administrative Leave Without Pay and the act of cancellation of her medical benefits, was in violation of any condition upon which Plaintiff would consider Administrative Leave without a hearing, and the action taken by the County did constitute a violation of Plaintiff's vested rights, and a willful violation of Ada County Code, § 1-7G-3, alleged above, and Plaintiff is entitled to be fully compensated and receive an award for all medical expenses and damages incurred by such wrongful conduct.

Appendix 80

LXXIX.

That as a result of this wrongful entry of Administrative Leave Without Pay, Plaintiff was denied her entitled to salaried wages for which Plaintiff has not received any of that compensation due her, and is entitled to be compensated in the sum of the accrued amount of those salaried wages for regular pay and routine overtime and holiday pay, and payment therefor is due Plaintiff.

COUNT VI.

LXXX.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXXIX above, inclusive, as though said allegations were set forth and contained in full herein.

LXXXI.

That Plaintiff does allege that, as confirmed by Sergeant Johnson's report (page 7 and 8), on December 16th and 17th, 1999, Plaintiff was officially under surveillance, as officers do in criminal investigations; that such conduct could serve no lawful or legitimate purpose in the investigation of this administrative overpayment error; that these actions were intended to frighten Plaintiff, and cause her to suffer more anxiety, and encourage her to see the wisdom in accepting a course of resignation as the convenient resolution to avoid this emotional pressure; that said conduct was designed to influence Plaintiff as a sensible alternative to the ongoing anguish and harm being caused to her fragile health; that such conduct can be understood by Plaintiff to have been pursued only in the context of harassment, meant to influence Plaintiff

to resign, like the Sheriff wanted; that Plaintiff witnessed Johnson violate Idaho Code, § 18-7905 in his attempt to achieve the County's directive to get Plaintiff to quit her job; that Sergeant Johnson violated Idaho Code, § 18-2604, as was his intent to intimidate and harass Plaintiff, knowing Plaintiff was involved in a civil proceeding that would involve the *Fair Labor Standards Act*, Title 29 U.S.C., § 201 *et seq.*; that Plaintiff does allege, and as a matter of law, Ada County Code, § 1-7A-2A and § 1-7A-2B does prohibit discrimination and harassment of an employee in any form, and as a result of such conduct, did cause Plaintiff emotional trauma and mental anguish, compounding the injury and add to financial stress and loss for which Plaintiff is entitled to be fully compensated and receive an award for all damages incurred by such wrongful conduct.

COUNT VII

LXXXII.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXXXI above, inclusive, as though said allegations were set forth and contained in full herein.

LXXXIII.

That pursuant to Title 29, U.S.C. § 215 (a) (3), said Defendants, Ada County, and its Sheriff's Office, have conspired to discriminate against Plaintiff throughout their entire engagement, once the overpayment error was discovered by the County, and Defendants have violated Plaintiff's rights, as were established upon her effective employment date of July 10, 1997, as was afforded to Plaintiff

under the Federal *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 201 *et seq.* The County has violated Ada County Codes, State, and Federal Laws on a variety of issues of compensation, undue influence and duress, threat and extortive conduct, harassment, discrimination, and arbitrary and capricious conduct, which ultimately culminated in the deliberate and wrongful separation and termination of her employment, and has deprived Plaintiff of her entitlements to wages and benefits due to her under her classified employment with the Ada County Sheriff's Office, as funded and controlled by Ada County.

LXXXIV.

That in support of this ongoing discriminatory conduct, from July 20, 1999, through the current date, only Plaintiff has been terminated, and each of the three (3) Ada County employees who were involved in the creation and perpetuation of the administrative overpayment error that resulted in the deposit of funds under the County's direct deposit system to Plaintiff's joint checking account, are still employed with Ada County in the same positions they had when the administrative error was created. That none of these employees were interrogated, exposed to undue influence or duress, threatened, harassed or terminated, or ever threatened to resign, ordered to attend meetings, placed under surveillance, or threatened with being charged criminally as a result of their actual and known involvement.

LXXXV.

That the retained employment of those employees directly responsible for the administrative overpayment error does constitute a policy of arbitrary, capricious, and discriminatory conduct, imposed within the administration of Ada County

classified employees by the Sheriff's Office, and a violation of FLSA.

LXXXVI.

That the reckless indifference and discriminatory conduct of these said Defendants did serve to deprive Plaintiff of certain vested rights, privileges and immunities secured to her by the Constitution of the United States of America, including the following:

a. The right to be secure in her person and effects against unreasonable detention of her person under the Fourth and Fourteenth Amendments to the Constitution.

b. The right to be free from detention or interference with her right of freedom guaranteed to her under the Sixth and Fourteenth Amendments to the Constitution.

c. The right to be free to pursue her life, liberty and pursuit of happiness, and not to be deprived of same without due process of law, founded upon a factual and lawful basis, under due process of law, with equal protection extended to her under the law, as provided for under the State of Idaho Constitution, and by the Fourteenth Amendment to The United States Constitution.

LXXXVII.

That as a result of these acts of indifference and discriminatory conduct, Plaintiff is entitled once again to be

fully compensated and receive an award for all damages incurred as a result of such wrongful conduct.

COUNT VIII

LXXXVIII.

Plaintiff does re-allege each of the General Allegations and Specific Allegations set forth and contained in Paragraphs I through LXXXVII above, inclusive, as though said allegations were set forth and contained in full herein.

LXXXIX.

That because of the actions taken by all said Defendants, all of which occurred in the absence of any reason, justification, reasonable or probable cause, or credible or reliable evidence, and pursued in violation of the *Fair Labor Standards Act*, §§ 215 (a) (3) and 215 (a) (5), and 42 U.S.C., § 1985, Defendants did cause to result the false accusations against Plaintiff contained in Sheriff Killeen's Notice of Intent to Discipline Plaintiff, which consequential effect was to cause Plaintiff to be terminated from her employment as was officially declared on February 15, 2000.

XC.

That at no time throughout any of the proceedings did there exist any good faith basis to justify the resulting investigation, interrogation, and attempted efforts to file criminal charges, and Plaintiff does allege all such acts were pursued without any probable cause, as was done, or pursued by said law enforcement officials identified above, under their unique power and authority vested in them under color of State Law.

Appendix 80

XCI.

That by reason of said wrongful acts identified above, including the detention, interrogation and attempted malicious prosecution, threats, administrative leave, cancellation of medical benefits and ongoing surveillance, and discriminatory activity, Plaintiff was required to secure the assistance of counsel, to secure the necessary legal representation to assist in addressing the false accusations, attempted malicious prosecution and mitigate Plaintiff's ongoing damages from these constitutional deprivations; that notwithstanding the false, malicious and capricious charges, attempts at malicious prosecution, pursued without probable cause, Plaintiff was caused to suffer the eventual termination from her employment, and Plaintiff has consequently suffered severe and irreparable health problems and financial losses, from such wrongful conduct; that throughout these events, Plaintiff has suffered great emotional and mental anguish, personal humiliation, resulting financial hardship, and deprivation of her constitutional right to life, liberty, happiness, state of tranquility, and peace of mind, and has suffered to endure an impugned character in the formation of these false charges and judicial proceedings, causing extreme stress to her and her family, of a significant concern, and by virtue thereof, Plaintiff has suffered a series of actual, special and general damages, substantial in nature, and does continue to suffer the emotional effects of these wrongful events, all of which has now become a matter of post-traumatic stress, coupled with the need for continued medical treatment, and Plaintiff does claim a right to recover for all of her actual, special and general damages, for all acts and conduct alleged in each cause of action in these pleadings, together with all costs and attorney fees incurred by Plaintiff, which damages are in excess of $10,000.00.

Appendix 80

WHEREFORE, Plaintiff does pray for Judgment against all said Defendants as follows:

1. Plaintiff does reserve the right to file an amended complaint, once the true names and identities of any other law enforcement officials become known to Plaintiff, as allowed by Rule 10 (a) (4), I.R.C.P.

2. For recovery of all actual, special and general damages resulting from the wrongful acts and conduct committed by said Ada County, its Sheriff's Office, and the law enforcement official Defendants, Vaughn Killeen, R. Monte MacConnell, Arville Glenn and Scott Johnson, acting under color of State Law and in behalf of said Ada County and its Sheriff's Office, and all actual, special, and general damages resulting from the wrongful conduct of all said Defendants as alleged in Counts I through VIII, inclusive. Plaintiff does allege her damages do well exceed the jurisdictional limits of $10,000.00 of the Magistrate Court of this state, and this action is within the jurisdiction of the District Court.

3. For recovery of all costs, expenses and attorney fees as was incurred, and as may be incurred by her in this action and provided for in accordance with the statutes of Idaho (Idaho Code, § 6-2101 *et seq.*), the provisions of Title 42 U.S.C., §§ 1981, 1983 and 1985 (3) and by virtue of Rule 54, I.R.C.P.

4. For such other and further relief as this Court may deem just and proper in the premises.

Appendix 80

5. PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES TRIABLE TO A JURY.

Dated this 19th day of July 2002.

/s/ Vernon K. Smith
Vernon K. Smith
Attorney for Plaintiff

STATE OF IDAHO)
: ss
County of Ada)

Stacy A. Gibson, being first duly sworn upon oath, deposes as follows: That I am the Plaintiff in the above entitled action; that I have read the above and foregoing Complaint; know the contents thereof; and the facts therein stated I believe to be true.

/s/ Stacy A. Gibson
Stacy A. Gibson
Plaintiff

SWORN AND SUBSCRIBED TO Before me this 19th day of July 2002.

/s/ Vernon K. Smith
[SEAL] Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 12/20/06

APPENDIX 81 – MEMORANDUM DECISION AND ORDER ENTERED BY THE U.S. DISTRICT COURT, MARCH 1, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

MEMORANDUM DECISION AND ORDER

Filed: March 1, 2006

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, et al,

Respondents.

Pending before the Court in the above-entitled matter are Defendants' motion to dismiss, Plaintiff's motion for summary judgment, and related motions. The motions have been fully briefed and are now ripe for the Court's review. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, these motions shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2).

Appendix 81

Factual and Procedural Background

On July 5, 2005, Plaintiff Stacy A. Gibson filed a complaint alleging civil rights violations pursuant to 42 U.S.C. § 1983 seeking compensatory, consequential, and punitive damages. (Dkt. No. 1). The complaint alleges Ms. Gibson was denied her right to procedural due process, equal protection, and right to judicial access by Defendants Ada County, Ada County Board of Commissioners, Ada County Sheriff's Office, and employees and/or agents of Ada County (collectively "Ada County"). Generally the claims relate to a dispute over Ms. Gibson's payroll receipts and ultimately her termination of employment as an Ada County Sheriff's Office Jail Technician. Ms. Gibson alleges Ada County denied her rights and entitlements to pursue due process, administrative review procedures, and access to the courts so as to prevent her from challenging the allegations regarding her employment and termination. Ms. Gibson claims the Defendants' continual denial of her due process rights cumulated in the final decision by the Ada County Board of Commissioners denial of her request for administrative review on July 2, 2003. It is from this final decision that Ms. Gibson alleges her clause of action before this Court arises and when she knew or had reason to know of her injury. Ms. Gibson also acknowledges in her complaint that there are three cases pending on appeal before the Idaho Supreme Court involving similar parties but different claims. The Idaho Supreme Court, however, has recently resolved those appeals in favor of Defendants. Gibson v. Ada County, et al., ___ P.3d ___, 2006 WL 299061 (Idaho 2006).

Appendix 81

Standard of Law

1) 12(b)(1):

A Defendant may move to dismiss a complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) in one of two ways. See Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979)). The attack may be a "facial" one where the defendant attacks the sufficiency of the allegations supporting subject matter jurisdiction. Id. On the other hand, the defendant may launch a "factual" attack, "attacking the existence of subject matter jurisdiction in fact." Id. When considering a "facial" attack made pursuant to Rule 12(b)(1), a court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988). A "factual" attack made pursuant to Rule 12(b)(1) may be accompanied by extrinsic evidence. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989); Trentacosta v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir. 1987). When considering a factual attack on subject matter jurisdiction, "the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing Thornhill, 594 F.2d at 733). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims ." Thornhill, 594 F.2d at 733 (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)).

However, "[t]he relatively expansive standards of a 12(b)(1) motion are not appropriate for determining jurisdiction ... where issues of jurisdiction and substance are intertwined. A court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting Augustine, 704 F.2d at 1077). In such a case, "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." Augustine, 704 F.2d at 1077 (citing Thornhill, 594 F.2d at 733-35). This case does not require the Court to resolve substantive issues in determining whether jurisdiction is proper.

2) 12(b)(6):

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, the court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure to state a claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "'The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in support of the claims.'" Id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other*

grounds by Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982)). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, (1957); see also Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995). A claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint asserts the
wrong legal theory or asks for improper relief. See United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963).

Analysis

Defendants' motion to dismiss asserts the complaint should be dismissed in its entirety based on the Rooker-Feldman Doctrine, issue/claim preclusion, and the statute of limitations. In addition Defendants seek costs and attorney fees. Ms. Gibson opposes the motion arguing her claim before this Court is timely filed and distinct from the issues raised before the state court.

1) Issue/Claim Preclusion:

Defendants argue the claims raised in the complaint are precluded by *res judicata* and/or collateral estoppel because they have already been litigated in state court. Ms. Gibson maintains the state court matters are not the same "substance or subject matter of her claimed injury in this Federal suit, as those actions preceded the accrual of this Federal subject matter constitutional violation raised in this suit." (Dkt. No. 8, p. 2). In particular, Ms. Gibson notes the state court matters involve events preceding the July 2, 2003 denial by the Ada County Board of Commissioners of her request for

administrative review; from which Ms. Gibson argues her federal claims arise. This denial, she claims, resulted in "a new civil rights violation, creating a new cause of action" and is the final overt act of continuing misconduct resulting in damages for which she now seeks relief. Thus, Ms. Gibson concludes that the cause of action alleged here has "never been raised as a cause of action and prayer for a damage claim" in any of the state court cases which concern earlier constitutional violations. (Dkt. No. 8, p. 7).[1] In reply, Defendants' point out that one of Ms. Gibson's state court cases was filed on July 30, 2003, after the July 2, 2003 denial which she claims gives rise to her federal cause of action now before this Court.

Section 1983 actions must afford full faith and credit to state judicial proceedings such that *res judicata* and other preclusion doctrines may operate to limit or exclude causes of action in federal court. See Strong v. Department of Correction, 2006 WL 47358 *2 (D. Idaho 2006) (citations omitted). "To determine whether a state judgment should have preclusive effect in a federal action, federal courts apply the state's rules governing preclusion." Id. (citation omitted). The Idaho Supreme Court has stated that "*Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." Lohman v. Flynn, 78 P.3d 379, 386 (Idaho 2003)

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[1] Ms. Gibson also notes that the state court cases were not "final" judgments as the state Supreme Court had not yet issued a decision. Since the time of the filing of her response brief, however, the state Supreme Court has issued a decision in favor of Defendants in those cases.

(citations omitted); see also Coeur d'Alene Tribe v. Asarco Inc., 280 F.Supp.2d 1094, 1117-19 (D. Idaho 2003) ("Although the literal definition of the term *res judicata* is expansive enough to cover both preclusion of relitigation of the same cause of action and relitigation of the same issue, the modern tendency is to refer to the aspect of the doctrine that precludes relitigation of the same issue in a separate cause of action as collateral estoppel, and to refer to that aspect preventing relitigation of the same cause of action as *res judicata*.") (quotations and citations omitted)).

"*Res judicata* thus applies to protect litigants from the burden of litigating the same cause of action with the same party or its privity." Coeur d'Alene Tribe, 280 F.Supp.2d 1094, 1117-19 (D. Idaho 2003) (citing Hindmarsh v. Mock, 57 P.3d 803 (Idaho 2002)). *Res judicata* "bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. Lohman, 78 P.3d at 386 (citing Hindmarsh, 57 P.3d at 805 (citations omitted)). For *Res judicata* to preclude litigation the following requirements must be met: (1) the same claim or cause of action arising out of the same facts must be involved in both suits; (2) there must be a final judgment on the merits in the prior action; and (3) the parties in the instant action must be the same as or in privity with the parties in the prior action in question. Coeur d'Alene Tribe, *supra* (citations omitted). "The purposes of these judicially created rules are to conserve judicial resources, protect

litigants from multiple lawsuits, and foster certainty and reliance in legal relations." Id. (citation omitted).[2]

As to collateral estoppel, the Idaho Supreme Court has delineate five factors that "must be considered in determining whether collateral estoppel will act as a bar":

> 1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the prior litigation.

Lohman, 78 P.3d at 386 (citation omitted).

The complaint filed here presents the same claims, arguments and issues as those raised in the state court causes

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[2] The Idaho Supreme Court has recognized that the three fundamental purposes served by *res judicata* are:

First, it "[preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results." Second, it serves the public interest in protecting the courts against the burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims. The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. Lohman, 78 P.3d at 386.

of action. This is evident from the pleadings and briefings filed in the state court matters cumulating with the Idaho Supreme Court's recent decision on those cases and the record in this case. In her briefing here, Ms. Gibson argues the state court matters are distinct in that they affect issues of employee rights, privileges, protections, and guarantees under FLSA but do not address due process and equal protection as to the July 2, 2003 denial by the Board of Commissioners. Further, Ms. Gibson claims that the state court matters do not seek a claim for damages nor cause of action for due process and equal protection violations occurring as a result of the July 2, 2003 denial. These distinctions are untenable. The Idaho Supreme Court's opinion acknowledged that Ms. Gibson's complaint does not specifically allege due process but stated "this does appear to be part of her argument on appeal. She maintains that the Board's refusal to grant review of the hearing officer's decision constitutes an ongoing deprivation of her due process rights." Gibson v. Ada County, *et al.*, 2006 WL 299061*7. This is the very issue raised here. The fact that her argument has been raised and litigated, is particularly evident from Ms. Gibson's position here that while the July 2, 2003 event gives rise to her "new" claim, Ms. Gibson maintains that this "new" claim includes the conduct of all Defendants for all previous ongoing misconduct as it is all continual violations of her due process; thus incorporating the entirety of her claims previously raised. It is clear from the pleadings, briefing, and records and, in particular, the Idaho Supreme Court's opinion, that the position pursued by Ms. Gibson here incorporates and is the same as that taken, argued, and fully litigated in the state court.

Appendix 81

There has been final judgments on the merits as to the issues raised in each of those state cases. See Gibson v. Ada County, *et al.*, ___ P.3d ___, 2006 WL 299061 (Idaho 2006). The question then becomes whether there was there privity between Ms. Gibson and the Defendants in this matter. "Even when the parties are not identical, privity may exist if there is substantial identity between parties, that is, when there is sufficient commonality of interest." Coeur D'Alene Tribe v. Asarco Inc., 280 F.Supp.2d 1094, 5117-19 (D. Idaho 2003) (quotations and citations omitted) (also citing Stratosphere Litigation, 298 F.3d at 1142 n. 3 (finding privity when a party is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved") (citation omitted); Shaw v. Hahn, 56 F.3d 1128, 1131-32 (9th Cir.1995) (finding privity when the interests of the party in the subsequent action were shared with and adequately represented by the party in the former action); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980) ("[A] 'privy' may include those whose interests are represented by one with authority to do so."). "[P]rivity is a flexible concept dependent on the particular relationship between the parties in each individual set of cases." Coeur d'Alene Tribe, *supra*. "[A] relationship of privity can be said to exist when there is an 'express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues.'" Id. (quoting In re Schimmels, 127 F.3d at 881 and citing Alpert's Newspaper Delivery Inc. v. N.Y. Times Co., 876 F.2d 266, 270 (2d Cir. 1989) ("The issue is one of substance rather than the names in the caption of the case; the inquiry is not limited to a traditional privity analysis.") (citations omitted).

Privity between the parties exists here. Ms. Gibson is a party to each of the suits filed in state court and in this matter. Likewise, Ada County and the Ada County Sheriff's Office were expressly named in the state cases and are named here. The Ada County Board of Commissioners, however, were not named in some the state cases but are named as Defendants in the suit before this Court. The inclusion of the Ada County Board of Commissioners does not leave the claim wanting for privity as there is a "sufficient commonality of interest" between the Defendants named in the state court actions and those named in the complaint filed here. Moreover, the Ada County Board of Commissioners was part of Ms. Gibsons' state court action seeking judicial review of the Board's decision denying her request for a hearing. See (Dkt. No. 7, Ex. C) (Gibson v. Ada County, Fourth District Court Case No. CV OC 0305850D, filed July 30, 2002). In that action the state court denied her petition for judicial review because, as a matter of law, "[t]here exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decisions of other elected County officers." Id. This ruling was upheld by the Idaho Supreme Court. See Gibson v. Ada County, ___ P.3d ___, 2006 WL 299061 *9 (Idaho 2006).

Because the claims and issues presented here were previously raised, argued, and finally decided on the merits in the prior state court actions between these same parties and/or those in privity, they are precluded and the motion to dismiss shall be granted.

2) Statute of Limitations:

The statute giving rise to Ms. Gibson's cause of action, 42 U.S.C. §1983, does not contain its own statutes of limitations,

"so courts borrow the most appropriate state statute of limitations." Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 974 (9th Cir. 2004) (citation omitted). Section 1983 actions, therefore, apply the statute of limitation applicable to personal injury claims. Id. (citing Wilson v. Garcia, 471 U.S. 261, 268, 276-80 (1985)). The parties do not dispute that the applicable statute of limitations here is promulgated in Idaho Code § 5-219(4) which provides a two year statute of limitation on personal injury claims. See Henderson v. State, 715 P.2d 978, 981 (Idaho 1986). The issue in this matter is whether the last overt act giving rise to the claim occurred on July 2, 2003, as Ms. Gibson argues, or whether it occurred outside the two year window as Defendants contend.

"In applying the statute of limitations to the case at bar...federal law determines the 'last act' for purposes of tolling a state's statute of limitations." Henderson, 715 P.2d 981 (citing Briley v. State of California, 564 F.2d 849, 855 (9th Cir. 1977)). "The generally accepted rule for ascertaining the 'last act' is provided in Cox v. Stanton, 529 F.2d 47, 50 (1975) [which states]: Federal law holds that the time of accrual [of a civil rights claim] is when plaintiff knows or has reason to know of the injury which is the basis of the action." Id.

Defendants argue Ms. Gibson's § 1983 claim was known or should have been known no later than February 15, 2000 when the Ada County Personnel Hearing Officer affirmed the Ada County Sheriff's decision to terminate her employment. Ms. Gibson maintains that the last act for purposes of the statute of limitations on her claim here was the Ada County Board of Commissioners' denial of her request for review on July 2, 2003. The Idaho Supreme Court recently determined that Ms. Gibson's § 1983 claim filed in one of her state court

actions began on February 15, 2000. Gibson v. Ada County et al., ___ P.3d ___, 2006 WL 299061 *8 (Idaho 2006). The § 1983 claim before the state court involved Ms. Gibson request for judicial review of Ada County's decision to terminate her employment. Before the Idaho Supreme Court, Ms. Gibson argued that the statute of limitations was tolled while she exhausted her administrative remedies and that the last act occurred on July 2, 2003 when the Board of Commissioners refused her request. Id. at *5.

Having reviewed the record, this Court concludes that Ms. Gibson either knew or should have known of the injury giving rise to her § 1983 cause of action on February 15, 2000. This is evidenced by the complaint itself. Though the complaint couches the claim as one arising from the July 2, 2003 action of the Board of Commissioners, as distinct from the state claim which involved events prior to that date, Ms. Gibson's arguments before the Idaho Supreme Court were the same as those she has raised here involving the July 2, 2003 Board of Commissioners Decision. Further, Ms. Gibson's knowledge of her claims prior to July 2, 2003 is evident in the multiple law suits pursued in state court asserting these same claims and allegations against many of the same parties well prior to the filing of this law suit. Further, the complaint asserts that the all of the prior alleged violations are also incorporated in the claim and a basis upon which Ms. Gibson seeks recovery. To adopt Ms. Gibson's argument would allow the complaining party to simply decide when the statute of limitations begins. Such reasoning goes against the purpose of having a statute of limitations and result in the statute of limitations being tolled indefinitely until the complaining party decides to file suit. Quite simply, repeated requests for review and repeated denials do not equate to tolling for

purposes of the statute of limitations. Ms. Gibson's complaint in this matter is untimely and barred by the two year statute of limitations. Accordingly, the Defendants' motion to dismiss is granted.

3) Costs and Attorney Fees:

Defendants' motion also includes a request for costs and attorney fees pursuant to § 1988 arguing Plaintiff's complaint is "frivolous, unreasonable, or without foundation." (Dkt. No. 7, p. 13). Ms. Gibson argues her claims are genuine and meritorious again noting that the issues raised here are separate from those in the state court matters. In particular, Ms. Gibson notes that the Ada County Board of Commissioners are named as Defendants in this matter and were not named in the state court actions. Defendants' assert the complaint in this action is merely the continuation of the same dispute between the parties and is precluded and in violation of the statute of limitations.

While the prevailing party in a § 1983 suit may recover attorney fees pursuant 42 U.S.C. § 1988(b), a prevailing defendant in a § 1983 suit should be awarded attorney fees only when the action is "unreasonable, frivolous, merciless, or vexatious." Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994). An "award of fees under § 1988 to a prevailing defendant is unusual because the policy reasons behind the award of fees to a prevailing plaintiff are not present when a defendant prevails. A district court in its discretion, however, may award a defendant in a civil rights suit attorneys' fees under § 1988 when a 'plaintiff's action was frivolous, unreasonable, or without foundation.'" Muzquiz v. W.A. Foote Memorial Hosp., Inc., 70 F.3d 422,

432 (6th Cir. 1995) (citation omitted). In deciding this issue, the Ninth Circuit has found the "authority addressing the award of attorney fees and costs to defendants under Title VII or 42 U.S.C. § 1988 to be instructive...[i]n setting out the 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith' standard" In Christiansburg Garment Co., the Supreme Court provided the following caveat:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22. In this case, although the Court has granted the motion to dismiss, Plaintiff's claim appears to have been made with the genuine belief that it raised a new cause of action under § 1983 for due process violations. To that end Plaintiff brought her § 1983 claim to this Court in an effort to challenge the process which she argues she was

entitled to and denied by Defendants. The Court, while not agreeing with Plaintiff's theory, does not conclude that the claim was frivolous or unreasonable.

4) Other Motions:

As the Court's ruling granting Defendants' motion to dismiss is dispositive of this matter, all other pending motions are deemed moot. (Dkt. No. 9, 17, 20, 29). As to Defendants' motions to strike, the Court also finds those motions to be moot. (Dkt. No. 13, 27).

ORDER

Based on the foregoing and being fully advised in the premises, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss (Dkt. No. 7). The motion is granted as to the dismissal of all claims in the complaint against all Defendants. The motion is denied as to the request for attorney fees. The remaining motions (Dkt. Nos. 9, 13, 17, 20, 27, and 29) are **DEEMED MOOT**.

DATED: **February 28, 2006**

[SEAL]

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX 82 – JUDGMENT ENTERED BY THE U.S. DISTRICT COURT, MARCH 1, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

JUDGMENT

Filed: March 1, 2006

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, et al,

Respondents.

Based upon this Court's Memorandum Decision and Order, dated February 28, 2006, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing from the Defendants and this case is **DISMISSED IN ITS ENTIRETY.**

DATED: **February 28, 2006**

[SEAL]

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX 83 – LETTER FROM GIBSON'S COUNSEL TO THE SHERIFF, PROSECUTING ATTORNEY, AND HUMAN RESOURCE DIRECTOR, DATED AUGUST 6, 1999, DENYING ALL ACCUSATIONS, ENTITLEMENT TO LEAVE, WITH PAY, ANNOUNCING GIBSON'S MEDICAL CONDITION, AND DEMANDING PRE-TERMINATION HEARING

August 6, 1999

Ada County Sheriff's Office
7200 Barrister Dr.
Boise, Idaho 83704

ATTN: Vaughn Killeen
Ada County Sheriff

Ada County Prosecutor's Office
602 W. Idaho St.
Boise, Idaho 83702

ATTN: Greg Bower
Ada County Prosecuting Attorney

Ada County Sheriff's Personnel Director
7200 Barrister
Boise, Idaho 83704

ATTN: Bethany Calley

Ada County Director of Human Resources
650 Main St., 3rd Floor
Boise, Idaho 83702

ATTN: Terry Johnson

Appendix 83

RE: Response to Notice of Intent to Impose Discipline
Employee: Deputy Stacy Gibson
Employee #: 54224
Social Security #: 518-78-2239
Employer Position: Ada County Jail Technician

Dear Messrs. Killeen, Bower, Johnson and Calley:

On August 2, 1999, a formal notice of Sheriff Killeen's Intent to Terminate Ms. Gibson as an Ada County Deputy Sheriff was issued and served upon Ms. Gibson, through her attorney, Vernon K. Smith, therein stating that said action was being taken as it was believed she had violated Ada County Code Provision, Section 1-7G-3.A(5), and by virtue of that allegation, had thereby violated Section 9.04, of the Ada County Sheriff's Department Policy Manual.

Essentially, the specific acts alleged as a basis for imposing such discipline of termination is her receipt of payment in excess of the position salary, an event occurring for approximately eight months as a result of an error in the Payroll Department, and it is now being claimed she purportedly knew of the overpayment and failed to notify the Sheriff's Office of the payment error, or otherwise take such effort so as to correct the overpayment or repay the funds to the County.

Ms. Gibson does deny the commission of any act that would suggest or support the allegation of wrongful conduct or demonstrate a willful violation of the Ada County Personnel Code, the Ada County Sheriff's Office Policy Manual or any provisions of the Statutes of the State of Idaho.

We do request a hearing, to which the employee is entitled, pursuant to this Notice of Intent to Terminate, and in the interim she does understand that she will be placed on

Appendix 83

administrative leave, with pay, until a written decision has been rendered following this reply and a hearing and disposition thereafter. We will await further notification of a hearing date, and we would appreciate sufficient time, as Ms. Gibson is currently on medical leave as a result of the traumatic and emotional impact created by the confrontational and accusatory actions taken against her by the Ada County Sheriff personnel, and their direct verbal assault that she committed wrongful or unlawful conduct in the course of her employment as a result of the County's own error in creating this overpayment situation, apparently originating in the Accounting Department.

We again request immediate delivery of a copy of the interview tapes taken during this investigation-interrogation process, and would again request a full accounting of payroll record prior to our participation in this Disciplinary Hearing.

We await further response on this hearing, and until then, we remain,

Yours very truly,

/s/ Vernon K. Smith
Vernon K. Smith

/s/ Stacy Gibson
Stacy Gibson